San Yan v Aziz bin Abdullah (suing as the father and the legal beneficiary to Allahyarham Mohd Halilazni bin Aziz) & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12–114 OF 2007
HO MOOI CHING JC
16 DECEMBER 2008

Tort — Damages — Road accident — Award of loss of earnings and future loss of earnings — Appeal against liability and quantum — Whether mulitiplier of 16 years appropriate

A motorcycle ridden by Mohd Halilazni Abd Aziz ('first respondent/the deceased') with Hafizal bin Mat Zain ('second respondent') as pillion rider was involved in an accident with a motorcar driven by the appellant. The learned sessions court judge found the defendant wholly liable for the accident and gave judgment for the first respondent ('suing as the father and beneficiary of the deceased') as well as for the second respondent. The sketch plan showed the site of the collision was a straight stretch road. The appellant's car was found straddling the centre white line at a slight angle to the right edge of the road and the motorcycle had fallen on the edge of its own side of the road. The learned sessions court judge had rejected the appellant's version of the accident as the appellant's car straddled the centre white line of the road and he had also rejected any contributory negligence on the part of the deceased. Hence, the second respondent was awarded damages of RM85,000 for loss of earning RM600 per month for 34 months and for loss of future earnings RM250 per month for 158 months. During the hearing of the appeal further proof were obtained that showed, inter alia, that the motorcycle was not where it was as claimed by the second respondent. The appellant appealed against the decision on liability and quantum. It was submitted in this court that the learned sessions court judge failed to provide relevant authorities to support the damages awarded and submitted grounds to support the award for loss of earning of the second respondent. Further, the multiplier calculation for future earnings of the second respondent ought to be 16 years considering the second respondent was 25 years at the time of the accident.

Held, allowing the appeal with no order as to costs:

(1) The final resting places of the vehicles cannot be proof of their positions

at the time of the collision. The fact that the appellant's car had come to a stop a metre into the respondents' side of the road was not a conclusive proof that she was there at the time of the collision. Conversely, the fact that the motorcycle was found lying at the edge of its side of the road did not mean that it was there at the time of the collision. The learned sessions court judge had also failed to consider that it was for the respondents to prove their case (see para 7).

(2) Although the damage to the vehicles was an indication of the points of contact between the vehicles, it could be indicative of where the collision took place. The fact that the position of the motorcycle presented it's front and offside to the offside front of the car was not proof of encroachment. By itself, it was equally consistent with the motorcycle having encroached into the path of the car (see para 9).

(3) It was surmised that as in the case of *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31, it was inconceivable how there could be acceptance of the first respondent's version of the accident. The physical evidence led to the irresistible inference that the collision occurred at or near the middle of the road and the finding of the sessions court that the appellant was wholly liable for the collision was against the weight of evidence. The sessions court's finding was set aside as to liability and found both the deceased and the second respondent equally liable for the collision (see para 11).

(4) The second respondent's disabilities were not as severe in comparison to the plaintiff in *Khairul Anuar bin Abu Bakar (an infant) v Lim Eng Choon* [1991] 1 MLJ 35. Thus, after factoring for inflation the sum of RM85,000 awarded by the learned sessions court judge was manifestly excessive and a sum of RM50,000 was awarded as it was a more reasonable figure (see para 16).

(5) Apart from the fact that there was no medical evidence to justify the second respondent being unable to work for 34 months as he had worked for a short stint after his accident hence, the award for loss of earning of RM600 per month for 34 months was against the weight of evidence. The second respondent should be allowed loss of earning during his recuperation period of six months for RM800 for a period of six months, totaling RM4,800 (see para 18).

(6) It is trite law that loss of future earnings falls under the category of special damages which must be strictly proved. However, there was no evidence submitted that the second respondent was in good health but for the injury nor was there any evidence as to his living expenses, thus there was no compliance to s 28A(2) of the Civil Law Act 1956. However, due to the second respondent's injuries there was a real or substantial risk that the second respondent would lose his job or get less

paid employment. It would be reasonable to assume that the second respondent would in all probability be engaged in work of a physical nature. The second respondent was awarded a sum of RM20,000 for loss of earning capacity (see paras 20–21).

[Bahasa Malaysia summary

Sebuah motosikal yang ditunggang oleh Mohd Halilazni Abd Aziz ('responden pertama/si mati') dengan Hafizal bin Mat Zain ('responden kedua') sebagai pembonceng telah terbabit di dalam kemalangan dengan sebuah kereta yang dipandu oleh perayu. Hakim mahkamah sesyen yang bijaksana mendapati defendan bertanggungjawab sepenuhnya untuk kemalangan tersebut dan memberi hukuman kepada responden pertama ('mendakwa sebagai bapa dan benefisiari si mati) dan juga untuk responden kedua. Pelan lakar menunjukkan bahawa tempat pelanggaran merupakan suatu jalan lurus. Kereta perayu ditemui tercelapak di tengah garisan putih pada suatu sudut sedikit ke sebelah kanan tepi jalan dan motosikal tersebut telah terjatuh ke tepi jalannya sendiri. Hakim mahkamah sesyen yang bijaksana telah menolak versi perayu mengenai kemalangan tersebut kerana kereta perayu tercelapak di tengah garisan putih jalan dan dia juga telah menolak sebarang kecuaian pada bahagian si mati. Oleh itu, defendan kedua telah diawardkan ganti rugi sebanyak RM85,000 untuk kemudaratan pendapatan sebanyak RM600 sebulan selama 34 bulan dan untuk kehilangan pendapatan masa hadapan sebanyak RM250 sebulan selama 158 bulan. Semasa perbicaraan rayuan bukti lain yang diperoleh menunjukkan, antara lain, bahawa motosikal tersebut tidak berada di tempat yang didakwa oleh defendan kedua. Perayu merayu terhadap keputusan atas liabiliti dan kuantum. Ia telah dikemukakan di mahkamah ini bahawa hakim mahkamah sesyen yang bijaksana gagal mengemukakan autoriti yang relevan untuk kerosakan yang dianugerahkan dan mengemukakan alasan untuk menyokong penganugerahan kemudaratan pendapatan responden kedua. Selanjutnya, pendaraban pengiraan untuk kehilangan pendapatan masa depan untuk defendan kedua seharusnya 16 tahun mengambilkira responden kedua hanya 25 tahun semasa kemalangan berlaku.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Tempat terakhir kenderaan-kenderaan berhenti tidak boleh menjadi bukti kepada kedudukannya pada waktu kemalangan. Fakta bahawa kereta perayu telah berhenti satu meter dari jalan responden bukan bukti kukuh bahawa dia berada di sana pada waktu kemalangan. Sebaliknya, fakta bahawa motosikal tersebut ditemui terbiar di tepi jalannya sendiri tidak bermakna bahawa ia berada di sana pada waktu kemalangan berlaku. Hakim mahkamah sesyen yang bijaksana juga

A gagal menimbangkan bahawa ia adalah tanggungjawab para responden untuk membuktikan kes mereka (lihat prenggan 7).

(2) Walaupun kerosakan pada kenderaan-kenderaan tersebut menjadi petunjuk poin penemuan di antara kenderaan-kenderaan tersebut, ia
B boleh menjadi petunjuk di mana kemalangan tersebut terjadi. Hakikat bahawa kedudukan motosikal menghadap bahagian depan dan kanannya sebelah bahagian kanan kereta bukan bukti pemasukan ke bahagian jalan kereta. Dengan sendirinya, ia adalah sama-sama konsisten dengan motosikal memasuki jalan kereta tersebut (lihat
C perenggan 9).

(3) Ia telah dinyatakan dalam kes *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31, bahawa adalah mustahil bagaimana boleh ada penerimaan terhadap versi responden pertama berkenaan kemalangan tersebut. Bukti fizikal membawa kepada kesimpulan yang tidak dapat dinafikan
D bahawa kemalangan tersebut berlaku pada atau berhampiran dengan tengah jalan dan penemuan mahkamah sesyen bahawa perayu bertanggungjawab sepenuhnya tidak disokong oleh bukti. Penemuan mahkamah sesyen diketepikan sebagai liabiliti dan mendapati kedua si
E mati dan responden kedua sama-sama bertanggungjawab di atas kemalangan tersebut (lihat perenggan 11).

(4) Kecacatan yang dialami oleh defendan kedua tidak seteruk jika dibandingkan dengan plaintif dalam kes *Khairul Anwar bin Abu Bakar (an infant) v Lim Eng Choon* [1991] 1 MLJ 35. Oleh itu, selepas
F pemfaktoran inflasi, jumlah RM85,000 yang dianugerahkan oleh hakim mahkamah sesyen yang bijaksana ternyata berlebihan dan jumlah sebanyak RM50,000 dianugerahkan kerana ia merupakan jumlah yang munasabah (lihat perenggan 16).

G (5) Selain daripada fakta bahawa tidak terdapat keterangan perubatan yang dapat memberi justifikasi terhadap responden kedua tidak dapat bekerja selama 34 bulan sedangkan dia telah bekerja untuk sementara waktu selepas kemalangan tersebut oleh itu, penganugerahan pendapatan masa hadapan sebanyak RM600 sebulan untuk 34 bulan menentang
H bukti. Responden kedua seharusnya dibenarkan kemudaratan pendapatan untuk tempoh pemulihan selama enam bulan sebanyak RM800 untuk tempoh 6 bulan, berjumlah RM4,800 (lihat perenggan 18).

I (6) Adalah undang-undang matan bahawa kehilangan pendapatan masa hadapan jatuh dalam kategori khas ganti rugi yang mesti dibuktikan secara tegas. Walau bagaimanapun, tidak terdapat bukti yang dikemukakan bahawa responden kedua berada dalam kesihatan yang baik jikalau bukan kerana kecederaan tersebut mahupun bukti mengenai kos sara hidupnya, oleh itu tidak ada pematuhan kepada

s 28A(2) Akta Undang-Undang Sivil 1956. Walau bagaimanapun, oleh sebab kecederaan responden kedua terdapat risiko sebenar atau substansial bahawa responden kedua akan kehilangan pekerjaan atau mendapat pekerjaan yang gajinya lebih rendah. Ia adalah munasabah untuk menganggap bahawa responden kedua berkemungkinan besar menceburi kerja yang melibatkan sifat fizikal. Responden kedua diawardkan wang berjumlah RM20,000 untuk kehilangan kapasiti pendapatan (lihat perenggan 20–21).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed 2005 Reissue) paras 240–243.

Cases referred to

Abdul Rahman v Soon Ah Hai [1978] 2 MLJ 31, FC (refd)
Khairul Anuar bin Abu Bakar (an infant) v Lim Eng Choon [1991] 1 MLJ 35, HC (distd)
Looi Gnan Peng v Bay Tong Hai [2005] 1 CLJ 685, CA (refd)
Paramasivam a/l Savy Peruman v Ibrahim b Mohd Amin & Anor [2008] 2 PIR 45, ScC (refd)
Saraswathy a/l Govindasamy v Balan Param Godan [1999] 1 Mallal's Current Law para 70, ScC (refd)
Sumarni v Yow Bing Kwong [2008] 1 MLJ 608, CA (refd)
Yang Yap Fong & Anor v Leong Pek Hoon & Anor [1987] 2 MLJ 201; [1987] 1 CLJ 377, SC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)

Subramaniam Shanmugam (Subramaniam Shanmugam & Associates) for the appellant.
A Syahril (A Syahril & Co) for the respondent.

Ho Mooi Ching JC:

[1] It is common ground that at about 12.30am on 8 June 2003, there was a collision involving motorcycle KAS 3105 ridden by Mohd Halilazni ('the deceased') with Hafizal bin Mat Zain (second plaintiff) as pillion and motorcar PDP 6976 driven by the defendant, at the Jitra/Kodiang Road. After a hearing, the sessions court on 12 June 2007, found the defendant wholly liable for the accident and gave judgment for the first plaintiff suing as the father and beneficiary of the deceased, as well as for the second plaintiff ('SP5'). The appellant/defendant ('SD1') appealed against the whole of the decision of the sessions court on liability and quantum.

[2] I found both the deceased and SD1 equally liable and allowed the appeal against liability as well as the appellant's claim for an indemnity against the first respondent. The appeal against quantum was also allowed in part. The plaintiffs now appeal against the whole of the decision of this court. I now set out the grounds of my decision.

LIABILITY

[3] It is undisputed that the deceased's motorcycle was proceeding from Jitra towards Kodiang ie from the top to the bottom of the sketch plan P1; while SD1 was driving her car in the opposite direction. Each claimed that the other had encroached into his path while overtaking a vehicle, thereby causing the accident. SP5's version was that when he and the deceased were on their way home from work, an oncoming car which was overtaking a motorcycle encroached into their path. At the time of the collision, their motorcycle was about two feet from the left edge of the road and as a result of the collision, SP5 fell by the left side of the road and the deceased succumbed to injuries sustained during the accident. The car was about 20 feet away from them when it first started overtaking the motorcycle. SP5 lodged a police report on 29 August 2003, more than two months three weeks after the accident, which is consistent with his evidence in court. No reference was made to that report in the course of his testimony and no explanation was given for the delay in lodging the report, although he was only on medical leave only until 27 July 2003.

[4] SD1 testified that on the night in question, she saw an oncoming motorcycle overtaking a Proton Wira. As the motorcycle was too close, she could not avoid the collision despite braking. She admitted not seeing the motorcycle until it was close to her car as it did not have its lights on. The scene of the accident was dark as it was unlit and she was driving at 30–40kph as the road was narrow. Each half of the road was 3.5m wide. Her police report lodged on the day of the accident was consistent with her evidence although it did not state that the motorcycle did not have its lights on. She claimed she was on her side of the road when the accident happened.

[5] The sketch plan shows that the site of the collision was a straight stretch of road. The car was found straddling the centre white line at a slight angle to the right edge of the road. Its front offside corner was 2.5m away from the right edge of the road (D1-A4), which places the car 1m into the opposite side of the road. The motorcycle had fallen on the edge of its own side of the road.

[6] The learned sessions judge was greatly influenced by the positions of the vehicles after the collision. In his words:

Kegagalan SD1 menerangkan bagaimana motor kereta berada lebih ke sebelah km jalan selepas kemalangan berlaku, sebalik berada di tengah-tengah garisan putih tengah jalan mengakibatkan mahkamah tidak dapat menerima versi SD1. Oleh itu mahkamah menolaknya.

[7] As he had rejected SD1's version of the accident, he also rejected any contributory negligence on the part of the deceased. In my view, the final resting places of the vehicles cannot be proof of their positions at the time of the collision. The fact that SD1's car had come to a stop a metre into the plaintiffs' side of the road is not conclusive proof she was there at the time of the collision. Conversely, the fact that the motorcycle was found lying at the left edge of its side of the road does not mean that it was there at the time of the collision. The learned sessions judge also failed to consider that it was for the plaintiffs to prove their case.

[8] The damage to the car was confined to the front and offside, while that to the motorcycle was also to the front and offside (see photos P2A, P2B, P2F and P2G). The fact that the frame of the motorcycle was bent to the right was found by the learned trial judge to be conclusive proof not only that the front offside of the car had crashed into that part of the motorcycle but also that it had done so after encroaching as far as the edge of the opposite side of the road. In his words:

Bagaimana sebelah kanan motorsikal boleh mengalami remuk ke dalam. Ini tidak lain daripada kerana (sic) hentaman bahagian hadapan kanan motor kereta SD1 yang telah masuk ke dalam laluan jalan motorsikal plaintif sehingga dekat tepi kiri jalan.

[9] To my mind, the learned sessions judge misdirected himself. While damage to the vehicles is an indication of the points of contact between the vehicles, it cannot be indicative of where the collision took place. The fact that the motorcycle presented its front and offside to the offside front of the car is not proof of encroachment. By itself, it is equally consistent with the motorcycle having encroached into the path of the car.

[10] The learned sessions judge went on to say '*kedudukan motorsikal plaintif walaupun bukan merupakan suatu sokongan tetapi dengan adanya tompokan darah dan pecahan plastik warna merah daripada motorsikal plaintif yang berada berdekatan motosikal plaintif bersertakan keterangan-keterangan yang disebut di atas telah menyokong versi SP5*'.

[11] It is difficult to see how the positions of the motorcycle juxtaposed with the fragment of red plastic from the motorcycle as well as the pool of blood could support the plaintiffs' case. The car is a much heavier vehicle and

A if impact was heavy enough to cause the motorcycle to be bent inwards towards its nearside, it follows that the motorcycle must also have been thrown in the direction of that force. Thus, its final resting place cannot be its position at the time of the collision. The pool of blood only shows where the rider or the pillion landed after impact. It is unreasonable to infer that one
B broken piece of plastic marks the point of impact, while ignoring the presence of broken glass and plastic from both vehicles in the middle of the road at *E* on the sketch plan. No explanation was offered as to how the debris from both vehicles was in the middle of the road if the accident happened as SP5 insisted it did. During the hearing of the appeal, both learned counsel agreed
C that photos P2E and P2F show scratch marks on the road. These were not recorded in the sketch plan. They lead obliquely from the middle of the right side of the road (A3A4 on the sketch plan) to the resting place of the motorcycle and afford further proof that the motorcycle was not two feet from the side of the road as claimed by SP5. P2E shows the start of the
D scratch marks to be roughly in the middle of the plaintiffs' half of the road and this is probably where the motorcycle landed after impact before it reached its final resting place. As in the case of *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31, it is inconceivable how there could be acceptance of the plaintiffs' version of the accident. The physical evidence leads to the
E irresistible inference that the collision occurred at or near the middle of the road and the finding of the sessions court that SD1 was wholly liable for the collision was against the weight of evidence. I set aside the sessions court's finding as to liability and found both the deceased and the defendant equally liable for the collision.

F

QUANTUM

Severe head injuries

G **[12]** The appeal against the quantum of damages awarded to SP5 was allowed in part. Inter alia, he suffered severe head injury with (a) cerebral oedema; and (b) thin subarachnoid haemorrhage (see the medical report from Hospital Kulim). The learned trial judge awarded the sum of RM85,000 without reference to any authorities.

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[13] SP5 was examined by neurosurgeon Mr B Gunasekaran on 14 April 2006, almost three years after the accident. He complained that his memory had been impaired after the accident and the neurosurgeon concluded after examination that SP5 had some impairment of memory which will be
I permanent.

[14] SP5's father complained that he was easily irritated or angered over trivial matters although he had improved over the years. According to the neurosurgeon emotional instability and nervous irritability are symptoms of

post-concussion syndrome which usually resolve within two years but occasionally last longer. He was also at risk of developing post traumatic epilepsy in future.

[15] Learned counsel for the plaintiffs submitted as persuasive authority the case of *Paramasivam a/l Savy Peruman v Ibrahim b Mohd Amin & Anor* [2008] 2 PIR 45, in which the sessions court awarded RM150,000 for cerebral oedema and severe head injuries with disabilities (impaired attention span (immediate recall), impaired recent recall, impairment of execution of written commands, weakness in the right upper and lower limbs). In that case, the disabilities are more severe than in the present case. Further, in the instant case separate awards had been given for the closed fracture of the right femur and disabilities and associated disabilities. Learned counsel for the defence submitted the case of *Saraswathy a/l Govindasamy v Balan Param Godan* [1999] 1 MCL (Jan) para 70 where the sessions court awarded RM35,000 for fracture of the right frontal bone, left intracerebral haemorrhage, generalised cerebral oedema, post concussion syndrome with absent-mindedness, personality changes, frequent headaches and poor recall of events.

[16] In *Khairul Anuar bin Abu Bakar (an infant) v Lim Eng Choon* [1991] 1 MLJ 35, the High Court awarded the plaintiff the sum of RM60,000 for several soft tissue injuries to the head and face in addition to diffused brain injury, damage to the right temporal lobe and the third cranial nerve. His disabilities were found to be (1) impaired sense of smell on left side; (2) slight left facial weakness; (3) weakness in left hand of grade 4/5 with fine and skilled movements such as writing affected; (4) third cranial nerve paresis with drooping right upper eyelid and a fixed and dilated pupil in the right eye rendering him unable to do close work or reading unless he adjusted to using one eye; and (5) post-traumatic epilepsy that was controlled by medication. He also suffered a drop of academic performance to the extent that he would not be able to complete his secondary education but no serious memory impairment; and did not mix with friends. In all, the injuries as well as the disabilities were far more severe than in the instant case. Even allowing for inflation since the award was given in 1990, I find the sum of RM85,000 given by the learned sessions court judge manifestly excessive by comparison and awarded a sum of RM50,000 which is a more reasonable figure.

Loss of earnings

[17] The sum of RM600 per month was awarded for 34 months as SP5's loss of earnings but the learned trial judge did not think it fit to offer any grounds to support this award. SP5 produced medical certificates from 8 June 2003 to 27 July 2003 but the report of the consultant orthopaedic surgeon Dr Sarwan Singh states that he was discharged on 14 September 2003 for

follow-up treatment at the orthopaedic outpatient clinic. As a result of the accident, he suffered a closed fracture of the right radius and ulna; and a closed fracture of the right femur. When Dr Sarwan Singh examined SP5 on 21 June 2004 about a year after the accident, the fractures of the right forearm had united in satisfactory alignment, while the fracture of the femur had united with a shortening of 1cm in the lower limb. There was some degree of pain due to the injuries to the muscles of the right thigh which should settle in time.

[18] SP5 said he was a helper at SP2's restaurant making drinks and washing dishes earning RM800 a month. He did not go back to work after the accident. According to his employer SP2, he went back to work after two months but she had taken on some other worker and she did not take him back because he was not healthy. SP5 said that he then worked in a restaurant in Jitra but did not say why he left that job. He also tried but failed to get a job at a Petronas station. Under cross-examination, he agreed that he lacked the initiative to look for a job after the accident and had no interest in an office job. Under re-examination, he said that he did not seek other jobs because he was unable to perform heavy work due to his weak arm, inability to stand for long and occasional bouts of dizziness. At the time of the trial, he was working at his father's food stall at daily wage of RM5–6. This was supported by the evidence of his father who said that SP5 came to work for him after the accident, although both did not say when he started work. Based on the information he gave the neurosurgeon at the time of examination on 14 April 2006 that he was working for his father, it was submitted that there should be an award for loss of earnings for 34 months from the time of the accident until 14 April 2006. This submission was apparently accepted wholesale by the trial court although such evidence should have come from SP5 himself and subject to cross-examination. Apart from the fact that there was no medical evidence to justify his being unable to work for 34 months, there is SP2's evidence that SP5 actually went back to get his old job two months after the accident. Further, even the neurosurgeon's report does not state that SP5 only started work on the date of the examination. This award is against the weight of evidence. Having regard to the nature of his injuries, it would be reasonable to allow SP5 six months to recuperate, during which time he should be allowed loss of earnings in full. I therefore allowed loss of earnings in full for RM800 for a period of six months, totalling RM4,800.

Loss of future earnings

[19] Section 28A(2) of the Civil Law Act 1956 provides that 'in awarding damages for loss of future earnings the court shall take into account:

(c)(i) that in the case of a plaintiff who has attained the age of fifty-five years

or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured';

(d) in assessing damages for loss of future earnings the Court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16'.

[20] It is settled law that loss of future earnings falls under the category of special damages which must be strictly proved. As to loss of future earnings, all the trial judge said was '*Seterusnya plaintif kedua dibenarkan mendapat kehilangan pendapatan masa hadapan pada kadar RM250 sebulan selama 158 bulan*'. SP5 was 25 years at the time of the accident and if at all the claim for loss of earnings was proved, the multiplier should have been 16 years, not 158 months or 13.16 years. In *Looi Gnan Peng v Bay Tong Hai* [2005] 1 CLJ 685, the Court of Appeal held that one of the elements that has to be proved for loss of future earnings is that the plaintiff was in good health but for the injury. In the instant case, there was no such evidence nor was there any evidence as to his living expenses. Therefore, s 28A(2) was not complied with. The claim for loss of future earnings was not made out and should have been disallowed (see also *Sumarni v Yow Bing Kwong* [2008] 1 MLJ 608).

[21] However, due to the effect of his injuries, I am satisfied that there is a real or substantial risk that he would either lose his job or get less paid employment (see *Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 2 MLJ 201; [1987] 1 CLJ 377; [1987] CLJ (Rep) 419). SP5 was right-handed according to the report of the neurosurgeon and both his right arm and right thigh will permanently be 25% weaker than normal. He had sat for his SPM examination but according the neurosurgeon's report, he had failed every paper except Bahasa Malaysia. It would be reasonable to assume that he would in all probability be engaged in work of a physical nature. Given that he was doing menial work, his physical disabilities would expose him to

A receiving less in the future than he did before. Nevertheless, SP5 himself admitted that he was not motivated to look for a job. Therefore, the RM5–6 a day that he is paid by his father cannot be a true indication of what he is capable of earning. In the circumstances, I thought it fair to award a sum of RM20,000 for loss of earning capacity.

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[22] The appeal was allowed as indicated above with no order as to costs.

Appeal allowed with no order as to costs.

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Reported by Mashrifah Ravendran

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